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No. 1296

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHN BURTON MOODY, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

MITCHELL ROGOVIN,
Assistant Attorney General,

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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A jury convicted petitioner on all four counts of an indictment charging him with wilfully attempting to defeat and evade his income taxes for the years 1956 through 1959 by filing false returns, in violation of Section 7201 of the Internal Revenue Code of 1954.[1] He was sentenced to serve concurrent terms

[1] The indictment charged that petitioner, during the four years, reported a total of $10,363.40 adjusted gross income and total tax liability of $880.77, while the correct amounts were, respectively $33,793.13 and $7,428.22. See the Sixth Circuit opinion affirming the conviction, 371 F. 2d at 690.

of five years' imprisonment on each count and to pay fines totaling $6,000. The court of appeals affirmed, but remanded to the district court for reconsideration of the length of the prison terms. 371 F. 2d 688, 693-694. This Court denied a petition for certiorari seeking review of the affirmance of the conviction. 386 U.S. 1003.

After a hearing, the trial court denied petitioner's resulting motion for reduction of sentence, pointing out that the sentence was indeterminate under 18 U.S.C. 4208(a)(2)—*i.e.*, "the prisoner may become eligible for parole at such time as the board of parole may determine." The court of appeals held that the trial court acted properly within its discretion (Pet. 40-41). This conclusion is correct, and there is no conflict of decisions or other matter warranting further review.

1. The indeterminate sentence procedure of Section 4208(a)(2) does not, as petitioner urges (Pet. 4-9), unconstitutionally delegate judicial sentencing power to the Executive Branch of the government. Of course, a court that makes use of Section 4208(a)(2) thereby shares with the Executive the power to determine the period of imprisonment. This procedure is one aspect of the modern penological approach which recognizes that a working partnership between the courts and the Executive is the better way of determining all the facts necessary to gauge the period of incarceration a particular convict merits and needs. It is no more improper than any procedure that allows a parole board to release a prisoner before the expiration of whatever maximum sentence the court imposes.

2. It has been clear ever since *Williams* v. *New York*, 337 U.S. 241, 246, that there was no impropriety (see Pet. 9-17) in the consideration the sentencing court gave to statements in the presentence report (Pet. 29) to the effect that petitioner was known as an abortionist and an indiscriminate dispenser of narcotics drugs. Any other view "would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation * * *" (*id.* at 250).[2]

3. A maximum sentence of five years, when petitioner could have been sentenced to a total of 20, is not (see Pet. 17-23) cruel and unusual punishment. See *Adam* v. *United States*, 266 F. 2d 819, 820 (C.A. 10); *Hunter* v. *United States*, 149 F. 2d 710, 711 (C.A. 6), certiorari denied, 326 U.S. 787; *Vega-Murrillo* v. *United States*, 264 F. 2d 240 (C.A. 9), certiorari denied, 360 U.S. 936; *Egan* v. *United States*, 268 F. 2d 820, 823 (C.A. 8), certiorari denied, 361 U.S. 868.

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[2] There is plainly no conflict (Pet. 9) with *Townsend* v. *Burke*, 334 U.S. 736, 739-741, where a sentence was vacated because it was based in part upon an erroneous assumption by the sentencing court that the defendant, who was not represented by counsel, had been convicted of crimes, of which he had, in fact, been found not guilty.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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